same issues as stated in (a) to (d) above. Lesco also contended that the notice of default in Form 16D issued by MBS was defective and invalid for the reasons stated in the affidavit in opposition. The fact that the MBS had obtained the default judgment was disclosed by Lesco in its affidavit. On September 19, 1986, the originating summons came up for hearing before Siti Norma Yaakob J. and after hearing submissions of counsel for the respective parties she decided on all the issues and granted an order of sale. The present appeal before the Supreme Court is brought against that order.

It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter. As MBS had chosen to sue Lesco in the Commercial Division before filing the originating summons and there was already default judgment in the suit and the application to set aside the default judgment is still pending, in our opinion the hearing of the originating summons should have been postponed until final disposal of the suit in the Commercial Division. Therefore we order that the order of sale be set aside. We further order that the originating summons be dealt with after the final disposal of the suit, and that appropriate orders should be made on the originating summons taking into consideration the result of the suit.

The appeal is allowed with costs here and in the court below. The deposit should be refunded to Lesco (appellant).

Appeal allowed.

Solicitors: *Krishnan & Co.; Rashid & Lee.*

ISMAIL BIN MOHAMAD v. HAJI YAHYA & 8 ORS.

ISMAIL BIN MOHAMAD v. MAYAH & 2 ORS.

[O.C.J. (L.C. Vohrah J.) 17 December 1987]

[Kuala Lumpur -- Civil Suit Nos. F 313 & 315 of 1983]

Land Law – Sale and purchase agreement – Private caveat to protect purchaser's interest – Registration of transfer despite caveat – Whether Collector in error – Whether registration of transfer conferred indefeasibility – Priority between two competing parties – National Land Code 1965, ss. 322, 340 & 418.

Contract – Construction of agreement – Contra proferentum rule.

In these two consolidated suits, the plaintiff (Ismail bin Mohamad) seeks a declaration that he is the beneficial owner of ¼ undivided share in a piece of land held under EMR 6130 for Lot 652, Mukim of Setapak, Daerah Wilayah Persekutuan, measuring 1 acre 0 rood 0.75 pole ("the said interest") and that in Civil Suit No. F 315 of 1983 the registration of the transfer by the three defendants (the three sisters Mayah, Siti and Rafeah) of their respective shares as beneficiaries of the estate of Undang bin Mangkuta to the nine defendants in Civil Suit No. F 313 of 1983 be cancelled.

In Civil Suit No. F 315 of 1983, the plaintiff also seeks specific performance and damages for breach of contract against the three defendants pursuant to the sale and purchase agreement which he had entered into with them. The three ladies sold their respective shares in the said interest to the plaintiff for valuable consideration.

On 23 November 1982, the plaintiff entered a private caveat against the said interest. On 18 April 1983, the respective shares of the three ladies were registered in favour of the nine defendants.

The five questions for determination are: (a) Is there a subsisting sale and purchase agreement between Ismail and Mayah, Siti and Rafeah? (b) Was the private caveat lodged by Ismail capable of binding the said interest in the light of its being registered specifically in the name of Undang bin Mangkuta (deceased) when at the material time the said interest had been extinguished by virtue of the transmission of the deceased's estate to the three ladies? (c) Was there a mistake made by the Collector of Land Revenue when he registered the transfer effected by the three ladies in the light of the private caveat? (d) Can the indefeasibility of title conferred upon registration be set aside in the event of the mistake made by the Collector of Land? (e) In the event that the registration is wrong and can be set aside on the ground of mistake, which of the two competing parties has priority?

Held: (1) the answer to (a) is in the affirmative;

(2) on (b), the caveat bound the said interest;

(3) the Assistant Collector was in error when he registered the transfer on 18 April 1983 in the face of the subsisting caveat;

(4) the answer to (d) is in the negative;

(5) (e) calls for no consideration;

(6) the declaration is granted that the plaintiff is not the beneficial owner of the said interest;

(7) the learned judge found that the three ladies were liable to the plaintiff for breach of contract and damages which are to be assessed;

(8) in respect of Civil Suit No. F 313 of 1983, each party was to bear his/their own costs. In respect of Civil Suit No. F 315 of 1983, the costs were awarded against the three ladies. The injunction originally granted to the nine defendants was discharged.

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212 (refd).

(2) *Che Dah & Anor.* v. *Commissioner of Land Titles (Penang and Malacca) Penang* [1973] 2 M.L.J. 29 (expld).
(3) *Land Executive Committee of Federal Territory* v. *Syarikat Harper Gilfillan Berhad* [1981] 1 M.L.J. 234 (folld).
(4) *Oh Hiam* v. *Tham Kong* [1980] 2 M.L.J. 159 (distd).
(5) *Frazer* v. *Walker* [1967] A.C. 569 (refd).
(6) *Zdrojkowski* v. *Pacholczak* (1959) N.S.W. 382 (refd).
(7) *Wilkins* v. *Kannamal* [1951] M.L.J. 99 (refd).
(8) *Taitapu Gold Estates* v. *Prouse* (1916) N.Z.L.R. 825 (refd).
(9) *Paora Torotoro* v. *Sutton* 1 N.Z. Jur. N.S. S.C. 57 (refd).
(10) *Ng Kheng Yeow* v. *Chiah Ah Foo & Ors.* [1987] 2 M.L.J. 330 (cited).

CIVIL SUITS.

D. Appaduray for the plaintiff in both suits.

Laurence Teoh for the first to ninth defendants in C.S. F 313/83.

Jalaludin Salleh (Federal Counsel) for the Official Assignee representing the estate of the third defendant in C.S. F 315/83.

Cur. Adv. Vult.

L.C. Vohrah J.: In these consolidated proceedings, Ismail bin Mohamad in Civil Suit No. F 313 of 1983 seeks, *inter alia,* a declaration that he is the beneficial owner of ¼ undivided share in land held under EMR 6130 for Lot 652 in the Mukim of Setapak, Daerah Wilayah Persekutuan, measuring 1 acre 0 rood 0.75 pole ("the said interest") and that, consequently, the registration of the transfer by the three sisters, Mayah, Siti and Rafeah, of their respective shares as beneficiaries of the estate of Undang bin Mangkuta *alias* Haji Mohd. Taib, who originally owned the said interest, to Haji Yahya Bin Hj. Ahmad and the eight other defendants ought to be cancelled. In Civil Suit No. F 315 of 1983, he prays, *inter alia,* for specific performance and damages for breach of contract against the three ladies pursuant to the sale and purchase agreements which he had entered into with them for the sale of their prospective shares in the said interest some five years prior to the transfer of these shares to Haji Yahya and the eight other defendants.

The facts which were agreed to and those which I found proved are as follows. Undang was the registered owner of the said interest which was transmitted to his three daughters, Mayah, Siti and Rafeah, by endorsement on the register document of title on 16 November 1982, in accordance with a distribution order made under the Small Estates (Distribution) Ordinance 1955 on 18 January 1982. However, in 1978 prior to the distribution and transmission, Mayah, Siti and Rafeah each entered into a written agreement in almost identical terms with Ismail, who was a developer, to sell their respective shares in the said interest for the sum of $11,000 (AB.1-3, AB.4-6 and AB.7-8 respectively). Mayah obtained a total sum of $6,200 as part payment, leaving a balance of $4,800 to be paid in respect of the purchase price; Siti a total sum of $6,000 leaving a balance of $5,000; and Rafeah a total sum of $6,700 leaving a balance of $4,300. Each of these three agreements had been prepared by an employee of Ismail. Later, Siti's son, Mohd. Alias bin Johan, approached Ismail on behalf of his mother and his aunt Rafeah with a request for more money in order to pay Baitumal for which there was no provision at all in the agreements. Nevertheless, Ismail handed over three cheques each for $2,222.22 for payment to Baitumal but the cheques were rejected as Baitumal required cash payment. Mohd. Alias then returned the cheques to Ismail and asked for cash instead on several occasions but his requests were not met whereupon he wrote a letter (D.1) on behalf of his mother and his two aunts on 20 May 1981 to Ismail in which he intimated that the three ladies intended to return the deposits and the sums of money that had been advanced to them and requested that they be informed of the amounts each of them had received. He also stated that as the matter could not be resolved, he hoped Ismail would reply direct to the three ladies. This letter was handed personally to Ismail but he refused to accept the offer to refund. However, Mohd. Alias proceeded to look for other buyers but upon instruction from the three ladies not to disclose the transactions they had entered into with Ismail. On 23 November 1982, as a result of an application made by Ismail a private caveat was lodged against the said interest. Despite the existence of this private caveat, transfers of the respective shares of the three ladies in the said interest were effected by two instruments of transfer (AB.26-29 and AB.30-33) to Haji Yahya and the eight other defendants and these transfers were registered by the Land Office on 18 April 1983. The names of these nine persons appear on the register document of title as the registered owners of the said interest.

Five issues have been agreed upon by counsel for determination by the court. They are:

(1) Is there a subsisting sale and purchase agree-

ment between Ismail and Mayah, Siti and Rafeah?

(2) Was the private caveat lodged by Ismail capable of binding the said interest in the light of its being registered specifically in the name of Undang bin Mangkuta *alias* Taib bin Mangkuta (deceased) when at the material time the said interest had been extinguished by virtue of the transmission of the deceased's estate to the three ladies?

(3) Was there a mistake made by the Collector of Land Revenue when he registered the transfer effected by the three ladies in the light of the private caveat?

(4) Can the indefeasibility of title conferred upon registration be set aside in the event of the mistake made by the Collector of Land Revenue?

(5) In the event that the registration is wrong and can be set aside on the ground of mistake, which of the two competing parties has priority?

I shall now proceed to deal with the five issues.

The terms of the three written agreements entered into between Ismail on the one hand and each of the three ladies on the other are similar and the English translation of the relevant provisions which have to be considered to resolve this issue is as follows:

"1. In consideration of ringgit two thousand ($2,000.00) only paid by the purchaser to the vendor by way of deposit (receipt of which the vendor hereby acknowledges) the vendor will sell and the purchaser will purchase the said property free from encumbrances other than [the] expressed and implied conditions on the relevant issue document of title at the purchase price of eleven thousand ($11,000.00) only.

2. The vendor agree[s] to execute the necessary documents of transfer upon completion of the application for distribution of estate of Undang bin JA Mangkuta (deceased) for 1/4th share.

3. The purchaser agree[s] to pay the balance of the purchase price of ringgit nine thousand ($9,000.00) only to the vendor immediately after the necessary document of transfer has been registered at the Land Office, Wilayah Persekutuan.

4. The vendor agree[s]and covenant[s] to refund the deposit of ringgit two thousand ($2,000.00) only to the purchaser should there be any complication and the transfer in favour of the purchaser cannot (sic) be registered by the necessary Land Office."

It was contended by counsel for Haji Yahya and the eight other defendants in C.S. F313 of 1983 that because each of the three agreements had been prepared by Ismail the construction of the agreement least favourable to Ismail should be adopted against him on the basis of the *contra proferentum* rule. He argued that because the refund offered by the three ladies in D.1 had been rejected by Ismail their obligations under their respective agreements ceased by virtue of clause 4. It was further contended by counsel that because Ismail issued three separate cheques each for the sum of $2,222.22 for payment to Baitumal and had made other advances over and beyond the deposit amount, payments not provided for in the agreement, there was by this fact a variation of each of the agreements and accordingly the refusal of Ismail to make the cash payment as requested by Baitumal was unreasonable and a fundamental breach of the agreement. Having regard to the provisions of clause 3, it is clear that Ismail made the additional payments to the three ladies over and above the deposit when he was not obliged to do so under the respective agreements. Similarly with the cheques he made out for payment to Baitumal. I cannot see how, on the evidence as it stands, any concessions that were made to them by Ismail either out of the kindness of his heart or because of persistent approaches on the part of the three ladies for payment due to their financial difficulties (and ostensibly for their benefit) can be construed as a variation of the terms of the contract so as to operate to his detriment. Counsel also urged, albeit somewhat faintly, that Ismail was estopped by his conduct from denying that the agreements had come to an end because he did nothing to enforce his rights under the respective agreements until 1982 when he lodged his caveat. The short answer to this argument can be found in Ismail's statement in examination-in-chief with regard to his reason for filing the private caveat (AB. 34-37) which was never challenged, as follows:

"This was my application to the Land Office for a private caveat to bind the land and prevent it from being transferred to other people. I filed this only in 1982 because before that the vendors used to come to my office but they kept silent around 1982 – the middle part of 1982. When I approached them they were not bothered. So I approached the son of one of the three ladies to discuss the matter and he said he did not know anything about the matter. I got worried because the value of the land in that area had increased in price and I feared that the land might be sold to other people. At the time of the lodging of the caveat I did not know what was happening with the transmission."

Having regard to the provisions of clause 2 and the fact that it was known to Ismail that an application

for distribution of the said interest to the three ladies was still pending, I cannot see how Ismail's conduct in not having taken any action until he lodged the caveat could be construed as acceptance on his part that the agreements had been terminated or rescinded. Accordingly, on the evidence available, I cannot see how the rights and obligations specified in each of the three agreements can be said to have been put at an end by virtue of the *contra proferentum* rule, variation or estoppel. The answer to the question posed in issue no. 1 must therefore be in the affirmative.

I shall now deal with issue no. 2 and issue no. 3 together as they involve considerations of a similar nature.

To consider the nature and the consequence of the private caveat lodged by Ismail, I have to examine the relevant provisions of section 322 of the National Land Code which reads:

"322.(2) The effect of any private caveat expressed to bind the land itself shall, subject to subsection (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of –

(a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and

(c) any lien-holder's caveat in respect thereof.

(3) The effect of any private caveat expressed to bind a particular interest only shall, subject to sub-sections (4) and (5), be to prohibit the registration, endorsement or entry on the register document of title of –

(a) any instrument of dealing directly affecting that interest (including any certificate of sale relating thereto); and

(b) where that interest is a lease or sub-lease –

(i) any claim to the benefit of any tenancy exempt from registration granted directly thereout, and

(ii) any lien-holder's caveat in respect thereof.

(4) A private caveat shall not prohibit the registration, endorsement or entry of any instrument, claim or lien-holder's caveat where the instrument was presented, or the application for endorsement or entry received, prior to the time from which the private caveat takes effect.

(5) A private caveat shall not prohibit the registration or endorsement of any instrument or claim where-

(a) the instrument was presented or the application for endorsement made by the person or body at whose instance the caveat was entered; or

(b) the said instrument or application was accompanied by the consent in writing of that person or body to its registration or, as the case may be, to the making of the endorsement."

I take the effect of these provisions to be that a private caveat expressed to bind an interest, so long as it remains in force, operates as a complete bar to the registration on the register document of title of any subsequent dealing affecting that interest including a certificate of sale relating thereto. As was stated by Wong Kim Fatt, the learned author of *Private Caveats: Entry, Extension, Removal and Appeals,* a private caveat "gives notice or warning in the register document of title of the claim of the caveator to the title or an interest in the land. While creating no new interest in land, it protects the caveator's existing interest, if any, *i.e.* an interest which has not been registered, at the same time maintaining the *status quo* of the parties concerned, pending where possible amicable settlement of the dispute, or if necessary its judicial determination ... and takes effect from the time of receipt of the application by the endorsement on the register document of title under the hand and seal of the Registrar ..." The learned author goes on to say at p. 4 that "(t)he prohibitive effect of a private caveat will not apply in two instances: (a) under section 322(5)(a) where the instrument or application is presented by the caveator, and (b) under section 322(5)(b) where the instrument or application is accompanied by the written consent of the caveator, or, as is usual in convey[anc]ing practice, the written notice of withdrawal under section 325(1) of the caveator, who may withdraw his caveat at any time".

A most authoritative judicial pronouncement on the nature and effect of a private caveat was made in *Eng Mee Yong & Ors.* v. *V. Letchumanan*[1] where Lord Diplock, delivering the opinion of the Privy Council, said:

"The system of private caveats is substituted for the equitable doctrine of notice in English land law. By section 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. *This is a very grave curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By section 324 the Registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.*"

(emphasis mine)

I now turn to the facts of the case. The caveat lodged by Ismail was made in the appropriate Form 19B under section 322(2) of the Code and was received and entered by the Assistant Collector of Revenue on the register document of title on 23 November 1982. The English translation of the contents of the forms substantiating Ismail's claim reads:

" NATIONAL LAND CODE
FORM 19B
(SECTION 323)
APPLICATION FOR ENTRY OF A PRIVATE CAVEAT

To,
Pemungut Hasil Tanah,
Wilayah Persekutuan,
Pejabat Tanah/Daerah,
Wilayah Persekutuan,
Off Jalan Tun Abdul Razak,
Kuala Lumpur.

I, ISMAIL BIN MOHAMAD (NRIC NO: 2848292) of No: 12, Jalan Lumut, Komplek Damai, Kuala Lumpur, do herewith apply for Entry of Private Caveat on land belonging to Undang Bin Mangkuta @ Taib Bin Mangkuta (deceased), in area la Or 0.75p which is an undivided share in land EMR 6130, Lot 652, Mukim Setapak, Gombak, Selangor.

(1) The said land (other information and interest of the said land are stated in the schedule attached) owned by Undang Bin Mangkuta @ Taib Bin Mangkuta is in the process of being applied for distribution by the potential receivers of the said distribution *i.e.*:

(I) Mayah Binti Taib
(I.C. No. 3911785)

(II) Siti Bte. Undang
(I.C. No. 7789375)

(III) Rafeah Bte. Mohd Taib
(I.C. No. 3852926)

all of whom are of Lot 546, Kampong Padang Balang, Jalan Bandar, Dalam, Batu 4½, Gombak, Kuala Lumpur (copy of document of application for distribution of the estate is hereby attached – Annexure A)

(2) The grounds of my claim are:

(a) All the potential receivers of the application for the distribution above have each sold the said land owned by Undang Bin Mangkuta @ Taib Bin Mangkuta (deceased) measuring in area 1 acre Or 0.75p or ¼ undivided share [of] the land EMR 6130, lot No. 652 Mukim: Setapak, Gombak, Selangor (information and interest of the said land as stated in the schedule Annexure 2) to me as follows:

(i) That MAYAH BTE HAJI TAIB (I.C. No: 3911785 as addressed above (para 1) has sold 1/3 undivided share which is going to be received by her, under the said application of distribution to me at a price of $11,000.00 (Ringgit Eleven Thousand only) vide an Agreement dated 19 May 1978 (the said Agreement is hereby attached – Annexure B). The total payments which have been made by me to Mayah Bte. Haji Taib are as follows:

19/5/78	$2,000.00
20/5/78	$ 200.00
1/8/78	$ 500.00
8/8/78	$2,500.00
30/6/79	$1,000.00
Total	$6,200.00

The balance of $5,000.00 shall be paid upon execution of document of transfer after the completion of the distribution of the estate of the deceased.

(ii) That SITI BINTI TAIB (I.C. No: 7789375) as addressed above has sold 1/3 undivided share which is going to be received by her to me at a price of $11,000.00 (Ringgit Eleven Thousand Only) vide Agreement dated 25 July 1977 (the said Agreement is hereby attached – Annexure C). The total payments which have been made by me are as follows:

25/7/77	$2,500.00
20/5/78	$1,000.00
20/9/78	$ 500.00
22/12/78	$1,000.00
30/6/79	$1,000.00
Total	$6,000.00

The balance of $5,000.00 shall be settled upon execution of the document of transfer after completion of the distribution of the estate of the deceased.

(iii) That HAJJAH RAFEAH BINTI HAJI TAIB (I.C. No. 3852926) as addressed above has sold 1/3 of undivided share which she is going to receive under the distribution of estate of the deceased to me at the price of $11,000.00 (Ringgit Eleven Thousand Only) vide an Agreement dated 10 January 1978 (copy of the said Agreement is hereby attached – Annexure D).

Total payments which have been made by me are as follows:

10/1/78	$2,500.00
20/5/78	$ 200.00
30/6/79	$1,000.00
8/8/78	$2,500.00
Total	$6,200.00

The balance of $5,000 only shall be settled upon execution of the document of transfer after completion of the distribution of the estate of the deceased.

(b) The purpose for the application of entry of this caveat is to hinder potential receivers under the application of the distribution of the estate of the deceased from selling or transferring the said land to other person/s.

(c) This application for entry of this caveat [is] also [made] for the purpose [of] making sure [that] my purchase of the said land can be completed upon completion of the distribution of the estate of the deceased.

(3) As required by the provisions of section 323 of the National Land Code, I now submit –

(a) payment for the registration of the caveat in the sum of $20.00;

(b) documents certified by me in respect of my claim as mentioned in para 2 above.

Dated this 22nd day of November, 1982.

Signed
Signature of Applicant

SCHEDULE OF THE LAND AND OTHER INFORMATION

Mkm./ Daerah	Lot No.	Particulars of Title	Share of land (Area)	Registered No. of Lease/ Sub-Lease	Registered No. of Charge
(1)	(2)	(3)	(4)	(5)	(6)
Setapak	652	EMR 6130	½ share	No	No ,,

It is clear that the caveat presented by Ismail was expressed to bind the undivided share belonging to Undang bin Mangkuta *alias* Taib bin Mangkuta (deceased) and the reason given for the entry was the protection of Ismail's rights under the three agreements in the prospective shares of the three beneficiaries. The circumstances of his legal claim have been described in great detail. Has this caveat then no effect in the light of the endorsement in the register document of title of the transmission of the said interest to the three sisters in equal shares one week earlier on 16 November 1982? The evidence of the Assistant Collector on this point deserves consideration:

"When the caveat was entered by the plaintiff on 23 November 1982 the office endorsed on the register document of title and served a notice in Form 19A on the registered land owner, Undang bin Mangkuta. This notice was issued on 23 November 1982. Subsequent to this notice being issued until 18 April 1983 when my office registered the two transfers, there was only the transmission ... endorsed on the register document of title. From my record there was no order to remove the private caveat of Ismail ... The caveat was entered against Undang bin Mangkuta but the transfer form was not signed by Undang and that was the reason why the office registered the two transfers although the caveat was still there to our knowledge ... I agree that unless the caveat is removed there cannot be any further dealings with the land. I agree in this case the caveat was never removed. I agree despite the caveat we still effected the two transfers on 18 April 1983. I effected the registration because the caveat was endorsed on 23 November 1982 on Undang bin Mangkuta but on that date *i.e.* 23 November 1982 the land did not belong to Undang bin Mangkuta because of the transmission on 16 November 1982 to Mayah, Siti and Rafeah ... It is not my duty to question the reasons why a caveat is lodged. Mine is purely an administrative function ...

When I registered the two transfers I was clear in my mind that the transfer was from the three defendants in C.S.F. 315/83 to the defendants Nos. 1-9 in C.S.F. 313/83. In my opinion the land in question was not encumbered in any way. It was my opinion that the caveat lodged by the plaintiff in respect of Undang's land did not relate to the three ladies ... Knowing the facts now, my opinion is that Ismail's caveat should have been lodged against the three ladies instead of Undang to be effective."

It is obvious from his evidence that the Assistant Collector was aware of the caveat when he registered the transfers from the three sisters to the nine persons. He in fact chose to exercise a judgment when he registered the transfers because he had concluded that the caveat did not relate to the deceased's interest but to the interests of the new owners as beneficiaries of the deceased and that accordingly the land in question was unencumbered so that registration on the register document of title was not prohibited. In other words the Assistant Collector did not, on his own admission, confine himself to the performance of an administrative act as he is constrained by law to do but instead exceeded his powers under the Code by choosing to adjudicate upon Ismail's claim as embodied in the caveat deciding it could not stand in the light of the change of ownership of the undivided share of the land caveated. Although the caveat was entered specifically against the said interest, that is, the ¼ undivided share of the deceased, in ignorance of the transmission that had been effected, it is manifest Ismail's purpose was to protect his rights in respect of the shares of the three beneficiaries in the said interest and it is clear beyond all argument that the caveat was intended to give notice to all at large of his claim to the said interest through the three beneficiaries and to avoid the very situation in which he has now found himself. I agree with the view expressed by the learned author David S.Y. Wong in *Tenure and Land Dealings in the Malay States* (1975) when he said at p. 418:

"So far as the lodging of a caveat is concerned, the right to lodge a caveat is not dependent on the validity of the particular interest claimed. It is the claim of an interest within the category of caveatable interests that alone matters. The reason is obvious: it is to relieve the caveat system from the cumbersome matter of ascertaining the validity of any interest to be protected. The system leaves the matter to a later stage by providing means to enable any individual person affected to challenge the claim and to have the caveat removed. But, once a caveat has been lodged and

so long as it remains on the register, it operates to protect the interest claimed irrespective of the question as to its validity."

Having regard to the reasons given by Ismail in entering the caveat, I am of the opinion that it bound the said interest as it put into issue the proprietorship of the ¼ undivided share of the land known as EMR No. 6130 Lot 652 in the Mukim of Setapak, Daerah Wilayah Persekutuan, and section 322(2) operated to freeze the register document of title and prevent the registration of "any instrument of dealing" such as an instrument of transfer. The Code provides for the withdrawal (see section 325), removal (see sections 326 and 327) and the lapsing (see section 328) of a private caveat and until any of these events takes place I am of the view that the caveat remains in force. In the result, I find that the Assistant Collector was in error when he registered the transfers on 18 April 1983 in the face of the subsisting caveat lodged by Ismail.

It has been urged by counsel for Ismail that the court could intervene under the general authority conferred upon it by section 417 to correct the mistake of the Assistant Collector by ordering rectification or amendment of the register document of title. That the court can in an appropriate case in exercise of its original jurisdiction make an order requiring such a rectification or amendment is evident on the authority of *Che Dah & Anor.* v. *Commissioner of Land Titles (Penang and Malacca) Penang*[2] wherein Chang Min Tat J. (as he then was) stated:

"Provision is ... made in the Code for an appeal from any decision, including a refusal, of the Registrar. It lies in section 418. The general powers of the court or a judge are contained in section 417 which are exercisable whether on appeal or in an original application and it is there that a proper scrutiny could be made and the title of a proper claimant be declared and affirmed and perfected by subsequent registration on an order of court."

This authority has to be read in the light of *Land Executive Committee of Federal Territory* v. *Syarikat Harper Gilfillan Berhad*[3] wherein Raja Azlan Shah Ag. L.P. (as he then was) at p. 237 had this to say:

"We now ask ourselves, what is there in the National Land Code which bars declaratory relief. Section 418 of the Code must now be looked at. If ... a proper reading of it leads one to the conclusion that it is the intention of Parliament to create the right absolutely and independently of any specific form of remedy, the respondents' action is well maintained. If on the other hand the proper interpretation is that the right and the remedy are *uno flatu*, that they are not mutually exclusive, that they are part and parcel of the remedy, then the action is misconceived.

Reading section 418 of the Code, we are satisfied that the latter is the correct interpretation. Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if an indefinite period were intended to be given. The period of three months is obviously for the purpose of preventing stale claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it."

In that case, the respondent was the registered owner of two pieces of land in the Federal Territory. The condition of use endorsed on the extracts of title was "fruit trees". The respondent agreed to sell a part of the said land on which was erected a block of flats. It applied for amalgamation and subdivision of the land and the Director of Lands and Mines intimated to it that it should first apply for a change of category of land use. It did not, however, appeal against the decision of the Director but instead applied by originating summons for a declaration that upon the true construction of the National Land Code it was not required to apply for a change of category of land use prior to the application for amalgamation and subdivision. The Federal Court decided that by virtue of section 418 the respondent should have appealed to the High Court against the decision of the Director and not sought a declaration.

The provisions of section 418 are worth considering in full at this stage and they read:

"418.(1) Any person or body aggrieved by any decision under this Act of the State Commissioner, the Registrar or any Collector may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.

(2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the court shall make such order thereon as it considers just.

(3) *In this section 'decision' includes any act, omission, refusal, direction or order.*" (emphasis mine)

Given the circumstances in which the Assistant Collector registered the transfers, it is not in dispute that he did not in fact communicate his decision to Ismail so that no purpose would be served by arguing that the only course available to

Ismail is to await a formal communication from the Registrar or Collector so that an appeal could be lodged by him as that communication is never likely to come. Even if such a communication were received, the court would still be faced with the situation (which currently obtains) of having to consider a *fait accompli*, Haji Yahya and the eight other defendants having already been registered as the proprietors of the said interest. Counsel for Ismail, in urging the court to exercise its general powers under section 417 to deprive them of the immunity conferred by registration on account of the mistake on the part of a Collector in registering the transfers, is in effect seeking a declaration instead of proceeding by the method specifically provided by section 418 for the purpose of impugning a "decision" of the Collector. I do not think I can accede to counsel's request in view of the pronouncement of Raja Azlan Shah quoted above and also because of section 340, the principal provision relating to indefeasibility of title which, in my opinion, militates against rectification in these proceedings. That section reads:

"340.(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible –

(a) *in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or*

(b) *where registration was obtained by forgery, or by means of an insufficient or void instrument; or*

(c) *where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.*

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) –

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent –

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by such law; or

(b) the determination of any title or interest by operation of law." (emphasis mine)

The register document of title by virtue of section 89 affords conclusive evidence that Haji Yahya and the other eight defendants are the registered proprietors of the said interest in their respective shares. Their title to the said interest is only defeasible in the three sets of exceptional circumstances enumerated in sub-section (2) of section 340. It has been conceded by counsel for Ismail that none of these exceptions applies in this case but recourse has been made by counsel to the case of *Oh Hiam* v. *Tham Kong*[4] to support his contention that in the instant proceedings the court should invoke its equitable jurisdiction. In that case, the parties had entered into a contract for the sale of certain pieces of land certified as rubber land but the written agreement and the transfer dealt not only with the rubber lands but also land on which stood a house. The High Court set aside the sale and transfer of the land on which stood the house, on the ground that there was a common mistake. On appeal, the Federal Court held that there was no mutual or common mistake and the appeal was allowed. On appeal to the Privy Council, it was held that the High Court had rejected the evidence given by the defendant in support of his contention that it was intended on both sides to include the lot in the contract of sale and was entitled to find that there was a case of mistake common to both vendor and purchaser and the Federal Court was wrong in arriving at a diametrically opposite view to that taken by the High Court; that the High Court was right in concluding that the evidence of the common mistake was of a sufficiently convincing cogency to enable it to order rectification of the transfer; and that the intervention of equity by a remedy *in personam* based upon a transaction to which the plaintiff and the defendant were parties could not be said to be ousted by the provisions of the relevant Land Code and therefore the High Court was correct in ordering rectification. In that case, Lord Russell of Killowen, after reviewing *Frazer* v. *Walker*[5], *Zdrojkowski* v. *Pacholczak*[6], *Wilkins* v. *Kannamal*[7], *Taitapu Gold Estates* v. *Prouse*[8] and *Paora Torotoro* v. *Sutton*[9] had occasion at p. 164 to say:

"The Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved

without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience. *In the instant case the defendant could have shown an indefeasible title had he sold Lot 3660, a step which he could not take* because he undertook to the court not to: the court could have granted an injunction against sale, and that could scarcely have been described as an order inconsistent with his indefeasible title. If the registered proprietor were a trustee, his indefeasible title would not have precluded intervention by the court in execution of the trust: under the then Land Code there was no express provision for registration as trustee. The indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor. All these are instances of equity acting *in personam*, and indeed the order in the instant case may be described as an order *in personam* that the registered proprietor should defeat his own title." (emphasis mine)

Oh Hiam v. *Tham Kong*[4] clearly relates to a situation where, in the words of Professor Visu Sinnadurai in *The Sale and Purchase of Real Property in Malaysia* (1984), "the courts have said that they would not allow the registered proprietor to seek protection under the indefeasibility provisions so as to deprive them of exercising their equitable jurisdiction in granting relief to a plaintiff against the registered proprietor in a claim brought against the registered proprietor *in personam*." In other words, the courts have intervened in contractual relationships between parties in order "to prevent registered proprietors from avoiding the 'conscientious obligations' entered into by the parties." The unconscionable conduct, as I see it, has been that of the three ladies and not that of the nine defendants and, as there is no contractual relationship between the nine defendants and Ismail, the principle in *Oh Hiam* v. *Tham Kong*[4] cannot, in my view, possibly apply. Nor can I see how the principle can be extended on grounds of conscience against the nine defendants for no fault of theirs but that of a third party, the Assistant Collector, in a situation where no privity exists. The answer, I therefore find, to the question posed by issue no. 4 in the circumstances of the instant proceedings must be in the negative. In the event, issue no. 5 calls for no consideration. However, if as between Ismail and the nine defendants the equity jurisdiction could somehow be invoked, I am of the view, having regard to the fact that the nine defendants purchased the said interest "in good faith and for valuable consideration" and in complete ignorance of Ismail's agreement with the three ladies, that they have a better claim than Ismail because they have actually paid the full purchase price, obtained registration of the said interest in their respective names expeditiously and gone into possession of the land: *Ng Kheng Yeow* v. *Chia Ah Foo & Ors.*[10] In the result, I declare that Ismail is not the beneficial owner of the said interest and find that the three ladies, Mayah, Siti and Rafeah, are liable to him for breach of contract, the damages for which are to be assessed.

In respect of costs, since the suit brought by Ismail against the nine defendants is in the nature of a test case, I make an order for both parties to bear their own costs. As regards Ismail's suit against the three ladies, I award costs against them.

The injunction originally granted against Haji Yahya and the eight other defendants is hereby discharged.

Order accordingly.

Solicitors: *Sidek, Zubir, Sulaiman, Nadzir & Partners; Nordin Torji & Yussof Ahmad.*

Re ROSHIDI BIN MOHAMED

[O.Cr.J. (Mohamed Arif J.) 14 & 25 May 1987]

[Kangar – Criminal Application No. 54-02-1987]

Constitutional Law – Habeas corpus – Application for – Order of detention made by magistrate under section 6 of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 – No notes of proceedings recorded – Whether magistrate had complied with requirements of law – Drugs Dependants (Treatment and Rehabilitation) Act 1983, s. 6 – Federal Constitution, Arts. 5 & 151(1)(a).

The detainee had been detained by an order of the learned magistrate under section 6 of the Drugs Dependants (Treatment and Rehabilitation) Act 1983. The detainee had been arrested by the police on suspicion of being a drug dependant and had been taken to the General Hospital where he was examined by a medidal officer. The learned magistrate subsequently ordered him to be detained under section 6(1)(a) of the Act. It was contended in this case that the learned magistrate had not complied with the mandatory provisions of the Act in that she had failed to make any record on whether she had complied with the various sub-sections of section 6, namely, sub-sections (1), (3), (4) and (5).

Held: in this case, in the absence of the record of proceedings kept by the learned magistrate, it was impossible to hold that the mandatory requirements of the law had been complied with and therefore the application must be granted and a writ of *habeas corpus* issued.

[*Editorial Note:* The appeal to the Supreme Court was heard by Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Wan Hamzah S.C.JJ. and dismissed on 12 October 1987.]